U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 October 2006

Case No. 2005-BLA-5086

In the Matter of:
G.N.[1]
Claimant,

v.

ASHER TRUCKING, INC.
Employer,
and
EMPLOYERS INSURANCE OF WAUSAU
Carrier,
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:
Edmond Collett, Esq.
On behalf of Claimant

Carl Brashear, Esq.
On Behalf of Employer/Carrier

BEFORE: Thomas F. Phalen, Jr.
Administrative Law Judge

DECISION AND ORDER – DENIAL OF BENEFITS

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[1] The Department of Labor has directed the Office of Administrative Law Judges, the Benefits Review Board, and the Employee Compensation Appeals Board to cease use of the name of the claimant and claimant family members in any document appearing on a Department of Labor web site starting prospectively on August 1, 2006, and to insert initials of such claimant/parties in the place of those proper names. This order only applies to cases arising under the Black Lung Benefits Act, the Longshore and Harbor Workers' Compensation Act, and FECA. In support of this policy change, DOL has directed submission of a proposed rule change to 20 C.F.R. Section 725.477, proposing the omission of the requirement that decisions and orders of Administrative Law Judges contain the claimant/parties' initials only, to avoid unwanted publicity of those claimants on the web, and has installed software that prevents entry of the full names of claimant parties on final decisions and related orders. I strongly object to that policy change for reasons stated by several United States Courts of Appeal prohibiting such anonymous designations in discrimination legal actions, such as *Doe v. Frank,* 951 F. 2d 320 (11th Cir. 1992) and

This is a decision and order arising out of a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C. §§ 901-962, ("the Act") and the regulations thereunder, located in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.[2]

On October 8, 2004, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a hearing. (DX 23).[3] A formal hearing on this matter was conducted on April 18, 2006 in Harlan, Kentucky, by the undersigned Administrative Law Judge. (Tr. 1). All parties were afforded the opportunity to call and to examine and cross examine witnesses, and to present evidence, as provided in the Act and the above referenced regulations.

ISSUES[4]

The issues in this case are:

1. Whether Claimant has pneumoconiosis as defined by the Act;

2. Whether Claimant's pneumoconiosis arose out of coal mine employment;

3. Whether Claimant is totally disabled;

4. Whether Claimant's disability is due to pneumoconiosis;

5. Whether Employer is the Responsible Operator;

6. Whether Employer has secured the payment of benefits;

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those collected at 27 Fed. Proc., L. Ed. Section 62:102 (Thomson/West July 2005). Furthermore, I strongly object to the specific direction by the DOL that Administrative Law Judges have a "mind-set" to use the complainant/ parties' initials if the document will appear on the DOL's website, for the reason, inter alia, that this is not a mere procedural change, but is a "substantive" procedural change, reflecting decades of judicial policy development regarding the designation of those determined to be proper parties in legal proceedings. Such determinations are nowhere better acknowledged than in the judge's decision and order stating the names of those parties, whether the final order appears on any web site or not. Most importantly, I find that directing Administrative Law Judges to develop such an initial "mind-set" constitutes an unwarranted interference in the judicial discretion proclaimed in 20 C.F. R. Section 725.455(b), not merely that presently contained in 20 C.F.R. Section 725.477 to state such party names.

[2] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] In this Decision, "DX" refers to the Director's Exhibits, "EX" refers to the Employer's Exhibits, "CX" refers to the Claimant's Exhibits, and "Tr." refers to the official transcript of this proceeding.

[4] At the hearing the Employer withdrew as uncontested the following issues: whether the claim was timely filed; whether the person upon whose disability the claim is based is a miner; whether the miner worked as a miner after December 31, 1969; whether the miner worked at least sixteen years in or around one or more coal mines; and whether Claimant has one dependent for purpose of augmentation. (Tr. 9). In addition, the parties stipulated to at least sixteen years of qualifying coal mine employment. (Tr. 9).

7. Whether the Claimant has established a material change in conditions per §725.309(c),(d);

8. Whether the miner's most recent period of cumulative employment of not less than one year was with the named Responsible Operator; and

9. Other issues which will not be decided by the undersigned but are preserved for appeal. (Item 18(a) & (b), DX 23).

(DX 23).

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations, and relevant case law, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

G.N. ("Claimant") was born on March 21, 1947 and was fifty-nine years-old at the time of the hearing. (DX 3). He completed the eighth grade. (DX 3). In April of 1968, Claimant married J.N. and they remained married as of the time the hearing. (DX 3, 6; Tr. 11). Claimant indicated he had no dependent children on the instant application form for benefits. (DX 3). At the hearing however, Claimant indicated he had a dependant daughter who was under twenty-three years of age, living at home, and attending school. (Tr. 11). He indicated she moved out after marrying in September of 2005. (Tr. 11).

On his application for benefits, Claimant alleged he engaged in underground mine employment for twenty-three years (DX 3), but stated he worked about sixteen at the hearing. (Tr. 16). Claimant last worked as a truck driver and end loader six days a week. (DX 5). Claimant last worked in and around the coal mines in 1994, when he quit because the mines were shut down. (DX 3). Since then, Claimant has worked as a truck driver, transporting logs and fuel until 2001. (Tr. 25; DX 7). Claimant noted that he was awarded benefits for his Kentucky State Black Lung claim. (DX 3).

Procedural History

Claimant filed his initial claim for benefits under the Act on July 10, 2000. (DX 1). This claim was denied by the District Director, Officer of Workers' Compensation on October 19, 2000. No further action was taken with regard to this first claim.

On November 13, 2003, Claimant filed the instant claim for benefits under the Act. (DX 3). The Director issued a proposed decision and order – denial of benefits on July 6, 2004. (DX 16). Claimant timely requested a formal hearing before the Office of Administrative Law Judges. (DX 18). The matter was transferred to this office on October 8, 2004. (DX 23).

Length of Coal Mine Employment

Claimant stated on his application that he engaged in coal mine employment for twenty-three years. (DX 3). The Director determined that Claimant has at least sixteen years of coal mine employment. (DX 16). The parties also stipulated that the Claimant worked at least sixteen years in or around one or more coal mines. (Tr. 9, 16). I find the record supports this stipulation (DX 4, 7; Tr. 9), and therefore, I hold that the Claimant worked at least sixteen years in or around one or more coal mines.

Claimant's last coal mine employment was in the Commonwealth of Kentucky (DX 1, 7, 21). Therefore, the law of the Sixth Circuit is controlling.[5]

Responsible Operator

Liability under the Act is assessed against the most recent operator which meets the requirements of Sections 725.494 and 725.495. The District Director identified Asher Trucking, Inc., as the putative responsible operator due to the fact that it was the last company to employ Claimant for a full year. (DX 16). Employer, however contests its designation as responsible operator. (DX 17; Tr. 9). The regulatory amendments at 20 C.F.R. Section 725.495(c)(2) shift the burden to require that the designated responsible operator establish "[t]hat it is not the potentially liable operator that most recently employed the miner." §725.495(c)(2). While the Employer contests the issue of responsible operator, they have put forth no evidence which contradicts the Director's finding.[6] Further, the record clearly supports the Director's finding that Asher Trucking meets the requirement of Sections 725.494 and 725.495. (DX 7). Given the weight of the evidence and Employer's failure to meet its burden, I therefore find that Asher Trucking, Inc. is properly designated as the responsible operator in this case.

Recent Employment Exceeding One Year

To be held liable, the Claimant must have been "employed by the operator … for a cumulative period of not less than one year." §725.495(c). Under the Act, a year "means a period of one calendar year, or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 working days." §725.101(a)(32). In determining if the miner has worked for more than a year as required by the act, it is appropriate for the Administrative Law Judge to use the table in Exhibit 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. *Clark v. Barnwell Coal Co.*, 22 B.L.R. 1-275 (2003). To properly calculate the number of days of coal mine employment, the Administrative Law Judge should determine the total amount of wages earned by the miner during the year and divide that amount by the coal mine industry average daily earnings reported at column three of Exhibit 610 in the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. *Id.*

[5] Appellate jurisdiction with a federal circuit court of appeals lies in the circuit where the miner last engaged in coal mine employment, regardless of the location of the responsible operator. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200 (1989)(en banc).

[6] The issue of Responsible Operator was not even addressed in Employer's post-hearing brief.

The determination of length of coal mine employment must begin with § 725.101(a)(32)(ii), which directs an adjudication officer to ascertain the beginning and ending dates of coal mine employment by using any credible evidence. There are several permissible sources of credible evidence. First, an administrative law judge may rely solely upon a coal mine employment history form completed by the miner. *See Harkey v. Alabama-By-Products Corp.*, 7 B.L.R. 1-26 (1984). A miner's uncontradicted and credible testimony may also be the exclusive basis for a finding on the length of miner's coal mine employment. *See Bizarri v. Consolidation Coal Co.*, 7 B.L.R. 1-343 (1984); *Coval v. Pike Coal Co.*, 7 B.L.R. 1-272 (1984). If the miner's testimony is unreliable, it is permissible for an administrative law judge to credit Social Security records over the miner's testimony. *See Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984). The record indicates Claimant worked for Asher Trucking from 1992-1994. (DX 7, 4). Below is the amount earned by Claimant compared with the industry average:

Year	Yearly Earnings	Daily Average	Days of Employment
1992	$ 6,155.75	$137.60	44.74
1993	$ 7,132.00	$138.08	51.65
1994	$13,940.00	$142.08	98.11
			194.50

Based upon the above calculations, the Claimant worked for the responsible operator for a total of 194.50 days. This exceeds the cumulative requirement of 125 days as prescribed in §725.101(a)(32). As such, I find that Claimant's cumulative employment with the responsible operator exceeded one year.

Employer Secured Payment of Benefits

The District Director found that the responsible operator or its insurer was capable of assuming liability for the payment of benefits. (DX 16). Section 725.495(c)(1) states that the responsible operator bears the burden of proving that it does not possess sufficient assets to secure the payment of benefits in accordance with Section 725.606. §725.495(c)(1). Here, Employer has presented no evidence which suggests it is not capable of paying benefits. Given the Director's finding with the absence of evidence presented by the Employer, I find that Asher Trucking, Inc. has secured the payment of benefits.

NEWLY SUBMITTED MEDICAL EVIDENCE

Section 718.101(b) requires any clinical test or examination to be in substantial compliance with the applicable standard in order to constitute evidence of the fact for which it is proffered. *See* §§ 718.102 - 718.107. The claimant and responsible operator are entitled to submit, in support of their affirmative cases, no more than two chest x-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two blood gas studies, no more than one report of each biopsy, and no more than two medical reports. §§ 725.414(a)(2)(i) and (3)(i). Any chest x-ray interpretations, pulmonary function studies, blood gas studies, biopsy report, and physician's opinions that appear in a medical report must each be admissible under Section 725.414(a)(2)(i) and (3)(i) or Section 725.414(a)(4). §§ 725.414(a)(2)(i) and (3)(i). Each party shall also be entitled to submit, in rebuttal of the case

presented by the opposing party, no more than one physician's interpretation of each chest x-ray, pulmonary function test, arterial blood gas study, or biopsy submitted, as appropriate, under paragraphs (a)(2)(i), (a)(3)(i), or (a)(3)(iii). §§ 725.414(a)(2)(ii), (a)(3)(ii), and (a)(3)(iii). Notwithstanding the limitations of Sections 725.414(a)(2) or (a)(3), any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence. § 725.414(a)(4). The results of the complete pulmonary examination shall not be counted as evidence submitted by the miner under Section 725.414. § 725.406(b).

Claimant selected Dr. Valentino Simpao to provide his Department of Labor sponsored complete pulmonary evaluation. (DX 8). Dr. Simpao conducted the examination on December 8, 2003. I admit Dr. Simpao's report under Section 725.406(b).

Claimant completed a Black Lung Benefits Act Evidence Summary Form. (CX 2). Claimant designated Dr. Simpao's December 2003 x-ray, PFT, ABG, and medical report. (DX 2). Claimant's evidence complies with the requisite quality standards of Sections 718.102-107 and the limitations of Section 725.414(a)(3). Therefore, I admit Claimant's designated evidence in its Summary Form.

Employer completed a Black Lung Benefits Act Evidence Summary Form. (EX 3). Employer designated Dr. Broudy's March 5, 2004 x-ray, PFT, ABG, and medical report as initial evidence.[7] For purposes of rebuttal, the Employer designated Dr. Barrett's interpretation of the December 2003 x-ray. Employer attempts to submit Dr. James Castle's July 19, 2005 medical report as "other medical evidence" as allowed under Section 718.107. However, this is clearly a medical report and does not qualify under this section. Employer also submitted two medical reports[8], both by Dr. Castle. The first is the one mentioned above, conducted on July 19, 2005. The second report was written on March 15, 2006. Given the limitations of Section 725.414(a)(3)(i), all three medical reports may not be admitted. Dr. Castle's second report reflects upon the opinions of his first and gives further consideration to newly admitted evidence. As both of Dr. Castle's medical opinions come to the same conclusion, I will consider the latter under Section 725.414(a)(3)(i).[9] As Employer's evidence complies with the requisite quality standards of Sections 718.102-107 and the limitations of Section 725.414(a)(3), with the exception of Dr. Castle's July 19, 2005 medical report, it is admitted for consideration in this claim.

[7] Employer also put forth Dr. Broudy's October 20, 2000 x-ray, PFT, ABG, and medical report, (along with Dr. Broudy's August 1994 medical report) as evidence for consideration. Due to the limitations of Section 725.309(d)(3), this evidence will not be considered at this point.

[8] The medical reports are marked EX 1 and EX 2.

[9] Both of Dr. Castle's opinions state the same thing; the latter merely restates the first, and inclusion of any two of the three the medical reports would not affect the outcome of this case. Thus, there is no reason for the Employer to seek admittance of both of Dr. Castle's reports. As such, I do not consider a show cause order here to be in the interests of justice or judicial economy.

X-RAYS

Exhibit	Date of X-Ray	Date of Reading	Physician/Qualification	Film Quality	Interpretation
DX 9	12/18/03	12/18/03	Simpao	1	1/1 pp
DX 10	12/18/03	01/24/04	Barrett / B-Reader[10], BCR[11]	1	Negative
DX 11	03/05/04	03/05/04	Broudy / B-Reader	1	Negative

PULMONARY FUNCTION TESTS

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results	Comments
DX 9 12/18/2003		56/67.0	1.36	1.97	042	69	Yes	Questionable effort & cooperation, but acceptable
DX 11 03/05/2004		56/68.0	1.77 1.67*	2.43 2.38*	034 041*	73 70*	---- ----	Invalid due to poor effort

* Indicates Post-Bronchodilator Values

ARTERIAL BLOOD GAS STUDIES

Exhibit	Date	pCO_2	pO_2	Qualifying	Comments
DX 9	12/18/03	46.0	87.4	No	
DX 11	03/05/04	43.9	76.8	No	

Narrative Reports

Dr. Valentino Simpao[12] examined Claimant on December 18, 2003 and submitted a report. (DX 9). Dr. Simpao considered the following: an age of fifty-six years; an EKG report showing abnormal results with first degree AV block; an employment history of twenty years; family history of high blood pressure; personal history of wheezing attacks (approximately two-three years), arthritic legs (four-five years), high blood pressure; a smoking history of twenty

[10] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

[11] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[12] CX 1 shows that Dr. Simpao is board certified in internal medicine with a subspecialty in pulmonary diseases. The name of the board is not given.

years of six-seven cigar days, having stopped in 1983; personal symptoms of five-ten years of daily production of fifteen CCs of dark sputum, two-three years of early morning wheezing, dyspnea in the early 1990's, five-ten years of cough, chest pain in 1996 with exertion, eight-ten years of ankle edema, and paroxysmal nocturnal dyspena over four years, approximately twice a week. After conducting the pulmonary function study, Dr. Simpao opined that Claimant's effort and cooperation were questionable.[13] Dr. Simpao diagnosed coal workers pneumoconiosis ("CWP"), listing multiple years of coal dust exposure and the chest x-ray as the sole etiology. While Dr. Simpao opined that these conditions resulted in only a minimal pulmonary impairment, he offered no opinion as to whether this impairment hinders Claimant's ability to perform his previous work in the coal mines or similarly arduous manual labor.

Dr. Bruce Broudy[14] examined Claimant on March 5, 2004 and submitted a report. (DX 11). Dr. Broudy considered the following: Claimant's history of smoking five or six cigars per day from the late 1960s – 1983; twenty years of coal mine employment; breathing trouble, dating back to 1998 with daily wheezing, coughing and sputum production; smothering; dyspenea on exertion walking a short distance on the farm; trouble sleeping; anterior chest soreness; medications for hypertension, back pain, leg pain, and depression; poor chest expansion; clear lungs to auscultation and percussion; regular cardiac rhythm; and slight hypoxemia. Dr. Broudy states that the spirometry was invalid due to poor effort. Dr. Broudy diagnosed hypertension, obesity, but opines that Claimant does not suffer from any form of pneumoconiosis. He concludes that Claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor.

Dr. James R. Castle[15] examined his own independent review dated July 19, 2005 and Dr. Simpao's medical evaluation dated December 18, 2003. Dr. Castle submitted his conclusions and reasoning in a report dated March 15, 2006. In reviewing the July 19, 2005 report, Dr. Castle considered twenty-two to twenty-three years of coal mine employment, a smoking history of approximately twenty years, Dr. Broudy's x-ray, invalid PFTs taken between October of 2000 through March of 2004, and normal ABGs. Dr. Castle concluded by reiterating his position that, based upon this evidence, Claimant does not suffer from CWP, nor he is permanently or totally disabled.

In examining Dr. Simpao's report dated December 18, 2003, Dr. Castle considered the twenty years of coal mine employment, with attacks of wheezing, arthritis, hypertension. Dr. Castle also recognized cigar smoking from 1963-1983. It is noted Claimant complained of sputum, wheezing, dyspnea, cough, chest pain, ankle edema, and paroxysmal nocturnal dyspnea. Dr. Castle examined the x-ray report of Dr. Simpao and noted Dr. Simpao is not a B-Reader and opines that the chest x-ray most likely does not show evidence of CWP (although there is no indication that Dr. Castle examined the x-ray himself), and noted the ABG was non-qualifying. He also examined the PFT, stating that the study should be declared invalid, as the studies show

[13] This PFT study is accompanied with a Pulmonary Function and Arterial Blood Gas study validation form signed by a physician, dated March 8, 2004. The Physician's name is illegible and no qualifications are provided.
[14] As noted above, Dr. Broudy is a B-reader. Dr. Broudy is also certified in both internal and pulmonary medicine by the American Board of Internal Medicine.
[15] Dr. Castle is certified by the American Board of Internal Medicine and the American Board of Pulmonary Disease. Dr. Castle also holds a B-Reader certification.

a less than maximal effort and hesitation at the onset of exhalation. Dr. Castle concludes with a degree of reasonable medical certainty based upon a thorough review of all the data that Claimant does not suffer from CWP, nor is he permanently or totally disabled.

Smoking History

At the hearing, Claimant indicated he smoked four of five cigars a day for approximately sixteen years, "give or take." (Tr. 12). Dr. Simpao considered twenty years of six or seven cigars a day. Dr. Broudy considered twenty three years of five or six cigars a day. Last, Dr. Castle, upon review of other medical reports, considered twenty years of cigar smoking, without providing a number. After weighing all the evidence, I find Claimant smoked five or six cigars a day for twenty years.

DISCUSSION AND APPLICABLE LAW

Claimant's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, that he:

1. Is a miner as defined in this section;

2. Has met the requirements for entitlement to benefits by establishing that he:

   (i) Has pneumoconiosis (see § 718.202);

   (ii) The pneumoconiosis arose out of coal mine employment (see § 718.203);

   (iii) Is totally disabled (see § 718.204(c));

   (iv) The pneumoconiosis contributes to the total disability (see § 718.204(c)); and

3. Has filed a claim for benefits in accordance with the provisions of this part.

Section 725.202(d)(1-3); *see also* §§ 718.202, 718.203, and 718.204(c).

Subsequent Claim

The provisions of Section 725.309 apply to new claims that are filed more than one year after a prior denial. Section 725.309 is intended to provide claimants relief from the ordinary principles of *res judicata*, based on the premise that pneumoconiosis is a progressive and irreversible disease. *See Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990); *Orange v. Island Creek Coal Compamy*, 786 F.2d 724, 727 (6th Cir. 1986); § 718.201(c) (Dec. 20, 2000). The amended version of Section 725.309 dispensed with the material change in conditions language and implemented a new threshold standard for the claimant to meet before the record may be reviewed *de novo*. Section 725.309(d) provides that:

> If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part, the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see § 725.202(d) miner. . .) has changed since the date upon which the order denying the prior claim became final. The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
>
> (1) Any evidence submitted in conjunction with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of the subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
>
> (3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence establishes at least one applicable condition of entitlement. . . .
>
> (4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue, shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.

§ 725.309(d) (April 1, 2002).

Claimant's prior claim was denied after it was determined that he failed to establish any of the elements of entitlement. (DX 1). Consequently, the Claimant must establish, by a preponderance of the newly submitted evidence, at least one applicable condition of entitlement previously adjudicated against him.

Total Disability

Claimant may establish a material change in conditions by demonstrating that he is totally disabled from performing his usual coal mine work or comparable work due to

pneumoconiosis under one of the five standards of Section 718.204(b) or the irrebuttable presumption referred to in Section 718.204(b). The Board has held that under Section 718.204(b), all relevant probative evidence, both like and unlike must be weighed together, regardless of the category or type, in the determination of whether the Claimant is totally disabled. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 B.L.R. 1-231 (1987). Claimant must establish this element of entitlement by a preponderance of the evidence. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986).

There is no evidence of complicated pneumoconiosis in the record. Therefore, the irrebuttable presumption of Section 718.304 does not apply.

Total disability can be shown under Section 718.204(b)(2)(i) if the results of pulmonary function studies are equal to or below the values listed in the regulatory tables found at Appendix B to Part 718. Also, in *Crappe v. U.S. Steel Corp*., 6 B.L.R. 1-476 (1983), the Board held that a non-conforming PFT may be entitled to probative value where the study was not accompanied by statements of miner cooperation and comprehension and the ventilatory capacity was above the table values. This is because any deficiency in cooperation and comprehension could only result in higher results.

The first PFT contained in the record was conducted on December 18, 2003 by Dr. Simpao. While the technician noted that Claimant's effort was "questionable," she did not state that Claimant's effort was poor, nor did she declare the study was invalid. Further, there is a validation letter which accompanies the study. The results of this study produced qualifying results. Thus, despite Dr. Castle's opinion of invalidity, I find the results of this to be probative.

The second PFT was conducted on March 5, 2004 by Dr. Broudy. The results were qualifying. However, Dr. Broudy stated that Claimant's effort was poor and deemed the study invalid. Because the Claimant failed to give a valid effort, I find the results to be of little value.

As the December 18, 2003 PFT's results are probative, and the March 5, 2004 results are of little value, I find that Claimant has established total disability under subsection (b)(2)(i).

Total disability can be demonstrated under Section 718.204(b)(2)(ii) if the results of ABGs meet the requirements listed in the tables found at Appendix C to Part 718. The ABGs conducted on December 18, 2003 and March 5, 2004 did not produce qualifying values that meet the requirements of the tables found at Appendix C to Part 718. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(ii).

Total disability may also be shown under Section 718.204(b)(2)(iii) if the medical evidence indicates that Claimant suffers from cor pulmonale with right-sided congestive heart failure. The record does not contain any evidence indicating that Claimant suffers from cor pulmonale with right-sided congestive heart failure. Therefore, I find that Claimant has failed to establish the existence of total disability under subsection (b)(2)(iii).

Section 718.204(b)(2)(iv) provides for a finding of total disability if a physician, exercising reasoned medical judgment based on medically acceptable clinical or laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents the miner from engaging in his usual coal mine employment or comparable gainful employment. Claimant's usual coal mine employment included driving an off-road truck hauling coal (which included the loading of the coal). (Tr. 18-19). Following the end of his coal mine employment in 1993, Claimant worked as a truck driver for a logging company, and a gas truck. (Tr. 24-25). This continued until 2001. (DX 7; Tr. 24).

Dr. Simpao provided no opinion in his medical report as to whether Claimant was totally disabled. He only described the Claimant possessed a minimal pulmonary impairment, and made no ultimate determination if Claimant possessed the capacity to return to his former job or find comparable and gainful work. An opinion may be given little weight if it is equivocal or vague. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873 (6th Cir. 2000). As Dr. Simpao's opinion is vague on the issue of total disability, I afford it little value.

Dr. Broudy, a Board-certified Internist, Pulmonologist, and B-Reader, examined Claimant's former duties as a miner, medical history, PFT, ABG, and opined that Claimant possesses the respiratory capacity to return to his last coal mining job, or one of similar physical demand in a dust free environment. Dr. Broudy based his opinion by noting the ABG was normal and Claimant's chest x-ray showed no abnormalities (he declared the PFT study invalid). Dr. Broudy utilized objective data to document and support his determination that the Claimant is not totally disabled. Noting Dr. Broudy's credentials, I afford his conclusions concerning total disability probative weight.

Dr. Castle, a Board-certified Internist, Pulmonologist, and B-Reader examined Claimant's medical records from the December 18, 2003 and March 5, 2004 examinations conducted by the above doctors. After examining all the medical records[16], Claimant's employment history, and smoking history, Dr. Castle concludes with a reasonable degree of medical certainty that Claimant is not permanently and totally disabled. However, he offers no opinion as to whether Claimant possesses the respiratory capacity to return to his last coal mine employment, or whether he could perform comparable work. Noting Dr. Castle's credentials, I afford his conclusions concerning total disability probative weight.

Accordingly, taken as a whole, the medical narrative evidence does not support a finding of total pulmonary disability. Thus, I find that Claimant has failed to establish total pulmonary disability under Section 718.204(b)(iv).

Reviewing the evidence considered under Section 718.204(b) as a whole, I find that Claimant has established that he is totally disabled due to a respiratory or pulmonary impairment under subsection (b)(2)(i). Since the newly submitted evidentiary record establishes total disability, and this evidence differs "qualitatively" from the evidence previously submitted, Claimant's subsequent claim will not be denied on the basis of the prior denial. As a result, I will consider the entire record *de novo* to determine ultimate entitlement to benefits.

[16] Dr. Castle did not consider the PFT results, as he believed both of them to be invalid.

PRIOR MEDICAL EVIDENCE

X-RAYS

Exhibit	Date of X-Ray	Date of Reading	Physician/Qualification	Interpretation
DX 1	08/18/2000	08/18/2000	Dr. Dahhan	Negative
DX 1	08/18/2000	09/06/2000	Sargent / B-Reader, BCR	Negative
DX 1	10/20/2000	10/20/2002	Dr. Broudy / B-Reader	Negative

PULMONARY FUNCTION TESTS

Exhibit/ Date	Co-op./ Undst./ Tracings	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Qualifying Results	Comments
DX 1/ 8/18/2000	Poor/ Poor	53/66.0	1.47 1.43*	1.93 1.87*	33 26*	76 76*		Invalid due to poor effort
DX 1/ 9/14/2000	Fair/ Fair	53/66.0	1.21 1.28*	1.59 1.57*	29 30*	76 77*		Invalid due to poor effort
DX 1/ 10/20/2000		53/68	3.64	4.54	144	80	No	Invalid due to poor effort; test in 1994 was invalid due to poor effort.

* Indicates Post-Bronchodilator Values

ARTERIAL BLOOD GAS STUDIES

Exhibit	Date	pCO_2	pO_2	Qualifying	Comments
DX 1	08/18/2000	40.6 40.3*	74.4 81.6*	No	
DX 1	10/20/2000	41.2	83.2	No	

* Indicates Post-Exercise

Narrative Reports

Dr. Dahhan examined Claimant on August 18, 2000. He considered the following: fifteen years of coal mine employment[17], five years as a logger following Claimant's last CME and a current gas truck driver; personal history of arthritis; five cigars a day from 1967 through 1983; symptomology (yellowish sputum, wheezing, dyspnea, and daily cough); exertion after two flights of stairs; x-ray, an invalid PFT, an ABG, and an EKG. He concluded by stating that

[17] Two years as an underground shuttle car operator and roof bolter and thirteen years as an inloader operator.

he could not assess the respiratory impairment due to poor performance on the PFT. Overall though, Dr. Dahhan opined that he did not appear from the physical examination to have evidence of total or permanent pulmonary disability. Ultimately, based upon the physical examination, Dr. Dahhan states that the Claimant has the respiratory capacity to perform the work of a coal miner or similar work in a dust-free environment.

Dr. Broudy examined Claimant on October 20, 2000. He considered the following: twenty-two years of coal mine employment, three of which were underground; a twenty pack year of cigarette smoking[18]; never seeing a doctor for breathing trouble or receiving medication for breathing; dyspnea on exertion going up and down hills while on the job with a progressive worsening of breathing since he quit; smothering at night; back and chest pain (no medication taken); cough with sputum in the mornings for the past year or two; no recent hemoptysis; no history of allergies, carcinoma, asthma, pneumonia, stoke, or diabetes; physical examination (abdominally obese, but no apparent distress; blood pressure of 140/80 with a pulse of sixty; normal respirations; afebrile; diminished chest expansion; clear lungs, but the forced vital capacity maneuver did not look good; regular cardiac rhythm; no cyanosis, clubbing, or edema of the extremities); an invalid PFT due to poor effort (Dr. Broudy noted that patient has a history of providing poor effort on PFTs dating back to 1994); normal ABG; clear x-ray. His only diagnosis is dyspnea and obesity. He concludes by stating there is no evidence of CWP, or any significant pulmonary disease or respiratory impairment which arose from coal mine employment, and that based upon his physical examination, he believes that Claimant possesses the respiratory capacity to do his previous work as a coal miner.[19]

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under Section 718.202. Claimant has the burden of proving the existence of pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis,

[18] Dr. Dahhan stated Claimant told him when he was not smoking cigarettes, he smoked cigars.
[19] Dr. Broudy also notes that at the time of the examination, Claimant was in fact a truck driver hauling fuel, which was comparable to his coal mine employment.

> anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For the purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

§§ 718.201(a-c).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis.

(1) Under Section 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. The record contains two newly submitted chest x-rays and two older chest x-rays.

The first x-ray dated August 8, 2000 was interpreted by Dr. Dahhan to be negative. The same film was interpreted by Dr. Sargent, who is both a B-Reader and BCR certified, to be negative. Thus, I find the August 8, 2000 film to be negative.

The second x-ray, which is dated October 20, 2000 was interpreted to be negative by Dr. Broudy who holds a B-Reader certification. As this is the only interpretation of the x-ray, I find it to be negative.

Dr. Simpao, who is neither a B-reader nor BCR certified, interpreted the December 18, 2003 film as positive for 1/1pp pneumoconiosis. Dr. Barrett, who possesses B-Reader and BCR credentials, interpreted the same film to be negative for pneumoconiosis. Given the superior credentials of Dr. Barrett, I find the December 18, 2003 film to be negative for pneumoconiosis.

The fourth x-ray dated March 5, 2004 was interpreted by Dr. Broudy, who holds a B-Reader certification. Dr. Broudy determined the x-ray to be negative for pneumoconiosis. Given there are no contrary interpretations, I find the March 5, 2004 x-ray to be negative for pneumoconiosis.

As the August 8, 2000, the October 20, 2000, the December 18, 2003, and the March 5, 2004 are all negative for pneumoconiosis, I find that the preponderance of the chest x-ray evidence establishes that there is no pneumoconiosis. Therefore, I find that Claimant has failed to establish the presence of pneumoconiosis under subsection (a)(1).

(2) Under Section 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. The evidentiary record does not contain any biopsy evidence. Therefore, I find that the Claimant has failed to establish the existence of pneumoconiosis through biopsy evidence under subsection (a)(2).

(3) Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of several cited presumptions are found to be applicable. In this case, the presumption of Section 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982. Therefore, Claimant cannot establish pneumoconiosis under subsection (a)(3).

(4) The fourth and final way in which it is possible to establish the existence of pneumoconiosis under Section 718.202 is set forth in subsection (a)(4) which provides in pertinent part:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

§ 718.202(a)(4).

This section requires a weighing of all relevant medical evidence to ascertain whether or not the claimant has established the presence of pneumoconiosis by a preponderance of the evidence. Any finding of pneumoconiosis under Section 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co*., 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director*, OWCP, 7 B.L.R. 1-860 (1985).

Dr. Dahhan believed based upon his August 18, 2000 examination Claimant possessed no respiratory impairments. He based this conclusion on the physical examination, length of coal mine employment, smoking history, clear x-ray, and normal ABG. Dr. Dahhan noted that he could not rely on the PFT as the test was invalid. His final conclusion was that Claimant possessed the respiratory capacity to perform the work of a coal miner or similar work in a dust-free environment. Dr. Dahhan considered the fact that Claimant currently worked as a truck-

driver, which could be considered comparable employment. Based upon this evidence, Dr. Dahhan concluded that there was no evidence of clinical pneumoconiosis. As his conclusion is supported by the objective evidence he considered, I find it to be well-reasoned and well-documented. Therefore, I accord Dr. Dahhan's opinion probative weight.

Dr. Dahhan diagnosed Claimant with no other cardiopulmonary conditions.

Dr. Broudy examined Claimant on October 20, 2000 and opined that there was no evidence of pneumoconiosis. He based his conclusion on his physical examination, length of coal mine employment, smoking history[20], clear x-ray, and normal ABG. (DX 1). He also noted that Claimant had never seen a doctor or required medication for his breathing problems. Dr. Broudy noted that he would not rely on the PFT as the test was invalid. His final conclusion was that Claimant suffered from dyspnea and obesity, but not from pneumoconiosis. He notes that there is no evidence that there is any significant pulmonary disease or respiratory impairment which has arisen from this man's occupation as a coal worker. As his conclusion is supported by the objective evidence he considered, I find it to be well-reasoned and well-documented. Therefore, I accord Dr. Broudy's opinion probative weight.

Dr. Simpao opined Claimant has pneumoconiosis based solely upon his own readings of a chest x-ray and Claimant's history of coal dust exposure from his December 18, 2003 examination. (DX 9). In *Cornett v. Benham Coal Inc.*, 227 F.3d 569 (6th Cir. 2000), the Sixth Circuit Court of Appeals intimated that such bases alone do not constitute sound medical judgment under Section 718.202(a)(4). *Id.* at 576. The Board has also held permissible the discrediting of physician opinions amounting to no more than x-ray reading restatements. *See Worhach v. Director, OWCP*, 17 B.L.R. 1-105, 1-110 (1993)(*citing Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-113 (1989), and *Taylor v. Brown Badgett, Inc.*, 8 B.L.R. 1-405 (1985)). In *Taylor*, the Board explained that the fact that a miner worked for a certain period of time in the coal mines alone does not tend to establish that he has any respiratory disease arising out of coal mine employment. *Taylor*, 8 B.L.R. at 1-407. The Board went on to state that, when a doctor relies solely on a chest x-ray and a coal dust exposure history, a doctor's failure to explain how the duration of a miner's coal mine employment supports his diagnosis of the presence or absence of pneumoconiosis renders his or her opinion "merely a reading of an x-ray ... and not a reasoned medical opinion." *Id*.

Dr. Simpao provided Claimant's Department of Labor sponsored pulmonary examination on December 18, 2003. Acknowledging that Dr. Simpao performed other physical and objective testing, he listed that he expressly relied on Claimant's positive x-ray and coal dust exposure for his clinical determination of pneumoconiosis. Moreover, he failed to state how the results from his other objective testing might have impacted his diagnosis of pneumoconiosis. As he does not

[20] Both coal mine employment and smoking history were overestimated, but this does not affect the weight of his opinion as he does not diagnose pneumoconiosis.

indicate any other reasons for his diagnosis of pneumoconiosis beyond the x-ray and exposure history, I find his report with respect to a diagnosis of clinical pneumoconiosis is unreasoned and give it little weight. [21]

Dr. Simpao diagnosed Claimant with no other cardiopulmonary conditions.

Dr. Broudy examined Claimant again on March 5, 2004. He diagnosed Claimant to not have clinical pneumoconiosis. Dr. Broudy's report considered Claimant's employment history, smoking history, physical examination results, negative chest x-ray, and negative ABG values. While the PFTs were positive, Dr. Broudy notes that Claimant's results were invalid due to lack of effort on behalf of the Claimant. Based upon this evidence, Dr. Broudy concludes that there was no evidence of clinical pneumoconiosis. As his conclusion is supported by the objective evidence he considered, I find it to be well-reasoned and well-documented. Therefore, bolstered by his advanced credentials as an internist and pulmonologist, I accord Dr. Broudy's opinion probative weight.

Dr. Broudy diagnosed Claimant with no other cardiopulmonary conditions.

Dr. Castle examined Claimant's newly submitted medical reports on March 15, 2006. Dr. Castle considered Claimant's employment history, smoking history, physical examination results, negative chest x-ray, and negative ABG values from both studies. Dr. Castle also examined the invalid PFT from March 5, 2004 and the qualifying PFT from December 18, 2003, opining that the latter could be invalid as the results were inconsistent. Based upon this evidence, Dr. Castle concludes that there was no evidence of clinical pneumoconiosis. As his conclusion is supported by the objective evidence he considered, I find it to be well-reasoned and well-documented. I do note that Dr. Castle never personally examined Claimant nor gave the qualifying PFT appropriate weight. Therefore, I accord Dr. Castle's opinion only some weight.

The record contains four reasoned and documented medical opinions. All three physicians opined that Claimant does not suffer from legal pneumoconiosis. All but one of the reasoned and documented medical opinions conclude that Claimant does not suffer from coal workers pneumoconiosis. Thus, even if Dr. Simpao's opinion were to be well reasoned, it would still not have established pneumoconiosis by the preponderance standard. Therefore, I find that

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[21] The District Director is required to provide each miner applying for benefits with the "opportunity to undergo a complete pulmonary evaluation at no expense to the miner." § 725.406(a). A complete evaluation includes a report of the physical examination, a chest x-ray, a pulmonary function study, and an arterial blood gas study. Reviewing courts have added to this burden by requiring the pulmonary evaluation be sufficient to constitute an opportunity to substantiate a claim for benefits. *See Petry v. Director*, OWCP 14 B.L.R. 1-98, 1-100 (1990)(*en banc*); *see also Newman v. Director*, OWCP, 745 F.2d 1161 (8th Cir. 1984); *Prokes v. Mathews*, 559 F.2d 1057, 1063 (6th Cir. 1977).
In this Decision and Order, I have found that Claimant's complete pulmonary evaluation by Dr. Simpao is unreasoned for purposes of determining pneumoconiosis. However, even if this claim were remanded to the Director to provide a reasoned and documented opinion concerning the existence of pneumoconiosis, Claimant could not prevail based on the preponderance of the evidence. Therefore, I find that remand of this case would be futile. *Larioni v. Director, OWCP*, 6 B.L.R. 1-1276 (1984); *see*, *e.g.*, *Mullins v. Director, OWCP*, No. 05-0295 BLA (BRB, Jul. 27, 2005)(unpub.); *Bowling v. Director, OWCP,* No. 05-0327 BLA (BRB, Jul. 29, 2005)(unpub.).

the Claimant has failed to establish the presence of pneumoconiosis by a preponderance of the evidence under subsection (a)(4).

Claimant has failed to establish the presence of pneumoconiosis under subsection (a)(1)-(4). The evidentiary record does not establish the presence of pneumoconiosis. Therefore, I find that Claimant has failed to establish pneumoconiosis under Section 718.202(a).

Causation of Pneumoconiosis

Once pneumoconiosis has been established, the burden is upon the Claimant to demonstrate by a preponderance of the evidence that the pneumoconiosis arose out of the miner's coal mine employment. 20 C.F.R. § 718.203 (2003).

If a miner suffers from pneumoconiosis and was employed ten years or more in the Nation's coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b); *Stark v. Director,* OWCP, 9 B.L.R. 1-36 (1986); *Hucker v. Consolidation Coal Co.*, 9 B.L.R. 1-137 (1986). As I have found that Claimant has established sixteen years of coal mine employment, if I had found that he suffered from pneumoconiosis, he would be entitled to the rebuttable presumption set forth in Section 718.203(b) that his pneumoconiosis arose out of his coal mine employment. However I have found that Claimant does not have pneumoconiosis. Because there is no pneumoconiosis, I find there is no causation.

Total Disability Due to Pneumoconiosis

The exertional requirements of the claimant's usual coal mine employment must be compared with a physician's assessment of the claimant's respiratory impairment. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000). Once it is demonstrated that the miner is unable to perform his usual coal mine work, a prima facie finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform "comparable and gainful work" pursuant to section 718.204(b)(1). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988). Nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis. Section 718.204(a); *Jewell Smokeless Coal Corp. v. Street,* 42 F.3d 241 (1994). All evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing by a preponderance of the evidence the existence of this element. *Mazgaj v. Valley Camp Coal Co.*, 9 B.L.R. 1-201 (1986).

While Claimant has put forth a modicum of evidence that he is totally disabled, I have found that Claimant does not suffer from pneumoconiosis. Thus, he cannot be totally disabled from pneumoconiosis. Further, as there is no determination put forth which states that Claimant cannot return to his last CME, and all opinions offered believe Claimant could perform his last CME, I find that Claimant has not proven by a preponderance that he cannot return to work. Thus, I find Claimant retains the functional respiratory capacity to return to his last coal mining job or one of comparable and gainful work.

Entitlement

While Claimant established a material change in conditions sufficient to meet the statutory requirements of Section 725.309(d), he failed to prove that he suffers from pneumoconiosis or that he is totally disabled due to pneumoconiosis. Therefore, Claimant is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which the claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of G.N. for benefits under the Act is hereby DENIED.

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THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this decision, by filing notice of appeal with the Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013- 7601. *See* 20 C.F.R. §§ 725.478 and 725.479. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).